Filed 5/18/09 In re D.M. CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re D.M., a Person Coming Under the Juvenile Court Law. | |
| RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>A.M. et al.,<br><br>Defendants and Appellants. | E046889<br><br>(Super.Ct.No. SWJ005684)<br><br>OPINION |

APPEAL from the Superior Court of Riverside County. Bradley O. Snell, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Sahyeh S. Fattahi, under appointment by the Court of Appeal, for Defendant and Appellant A.M.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant T.M.

Pamela J. Walls, County Counsel, and Sophia H. Choi, Deputy County Counsel, for Plaintiff and Respondent.

Lori A. Fields, under appointment by the Court of Appeal, for Minor.

A.M. (Father) and T.M. (Mother) appeal from the juvenile court's ruling terminating their parental rights to minor, D.M. (born in 2005) under Welfare and Institutions Code[1] section 366.26. Both parents contend the juvenile court erred (1) in denying their section 388 petition, (2) in finding it likely that the child would be adopted, and (3) in finding that the beneficial parent-child relationship exception to adoption does not apply. For the reasons described below, we affirm the court's ruling.

## I. PROCEDURAL BACKGROUND AND FACTS

The parents are in their early 20's and are married. Their son was born with ventricular septal defect, a heart condition that requires life-long medical care. The parents lived in a small camper trailer in the backyard of the paternal great-grandmother's house. They were later diagnosed as being "at a minimal functioning level." In April 2006, the child came to the attention of the Department after it received a report that the parents were not tending to his medical needs. The trailer was dirty, smelled, and lacked plumbing, water or heat. The child appeared to be underweight,[2] dirty, "listless and sedentary." The parents had allowed the child's medical insurance to lapse. They

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] At seven months old, the child was approximately 14 pounds, compared to his birth weight of eight pounds.

claimed that they lacked transportation to take him to the doctor, who had "cursed and screamed at them during the office visit." The child was placed in protective custody, and a petition was filed pursuant to section 300, subdivision (b).

In an amended petition, the Department alleged that the parents neglected the child's medical, nutritional, and health and safety needs by failing to follow through with doctor appointments and wellness checkups, and failing to provide healthy living conditions. At the detention hearing, the juvenile court found that a prima facie showing had been made and ordered the child temporarily detained. At the June 5, 2006, contested jurisdictional hearing, the court found that the child came within section 300, subdivision (b), ordered him removed from parents' custody, and ordered parents to participate in family reunification services.

At the six-month review hearing in December 2006, the Department recommended six more months of reunification. The parents had worked diligently on their case plan. They visited their son and built a bond with him. They indicated an understanding of getting medical care for him. They had completed their parenting class in the summer, started therapy in July, and were working on the issues that brought their child to the attention of the court. The parents wanted to rent a home but had a hard time finding jobs. As for the child, he was doing well with the foster mother and was very active and happy. Adopting the Department's recommendations, the court found that the parents' progress had been adequate but incomplete in that they failed to make substantive progress and complete the court-ordered case plan.

At the 12-month hearing on June 4, 2007, the Department initially recommended that services be terminated; however, it changed the recommendation to six more months of services. The parents continued to live in the pop-up trailer and look for employment. Nothing had changed since the beginning of the case regarding the living and employment situation of the parents. The therapist suggested that Mother should have been referred to the Inland Regional Center ("IRC") as a child. The therapist stated the parents were at a "minimal functioning level," and that Mother probably needed more help than Father. Nonetheless, the therapist opined they both needed more help before they would be able to take care of the child. The parents had day visits with their son at the paternal great-grandmother's home on Saturdays from 8:00 a.m. to 5:00 p.m. The foster mother stated the child was always happy to go with them but usually returned dirty and in need of a diaper change. The child's counsel asked that the parents be referred to IRC. The court adopted the Department's recommendations, with the addition of their referral to IRC, and continued services for another six months. The court further authorized overnight and weekend visits with the parents at the home of the paternal great-grandmother, upon a suitable home evaluation.

In July 2007, the visits became supervised because the parents had moved into a friend's home, which needed to be evaluated. On August 16, the parents were diagnosed with adjustment disorder. The therapist documented, "'there appears to be questionable levels of low intellectual functioning or possible [d]evelopment [d]elays.'" Psychological testing was requested to determine the level of parents' functioning in order to continue to guide parents to other services. According to the Department's

report, the parents appeared to be "oblivious to the many protective issues involved." They continued to talk about finding a job and suitable housing but did not appear to understand the condition of their medically enhanced child. They had failed to complete their court-ordered case plan and failed to demonstrate that they benefited from 18 months of services. The parents returned to the living situation they were in at the start of the dependency. Regarding their referral to IRC in the months of June, July, and August 2007, it was not until September 10 that they completed the necessary assessment that would result in IRC sending applications to them.

The December 2007 addendum report noted that the parents did not finish their psychological evaluations. They began the medically enhanced training classes beginning October 29, 2007. They received a certificate of completion for attending three of four classes. The parents had not completed cardiopulmonary resuscitation (CPR) training and had not received one-to-one training with the public health nurse as part of the medically enhanced class requirements. They were still in the process of completing their assessment for IRC. On November 29, Father reported that he began working part-time. The parents visited the child consistently; however, they generally watched a movie while the child played independently. The parents did not attend to the child's basic needs, such as "potty training or changing pull-ups" during visitation.

On January 15, 2008, the child changed placements to another medically enhanced home where the foster parents wanted to adopt him should services be terminated. On January 16, the parents stated that they had not completed their assessments with IRC, and Father reported that he had lost his job. On January 23, the psychologist concluded

there was no reasonable likelihood the parents would benefit from any interventions or reunification services. The psychologist documented it was more than evident that it would be an overt detriment to place the child in parents' care. The parents did not have suitable housing and they remained in the same living situation as the start of the dependency. As of January 16, they had not completed their IRC assessment process.

According to the April 15, 2008, addendum report, the parents made little effort to communicate with the child during their visits. They remained seated, talking between themselves, as the child played with toys. The social worker opined that the parents did not demonstrate basic parenting skills during their supervised visitation. Instead, they simply sat, smiled, or watched television. The parents met one time with the public health nurse, who stated the parents were unable to recall information covered in the medically fragile class they had attended. The parents failed to follow through with their IRC referral until the month of the 18-month review hearing. After completing the assessment process and being assigned workers, the parents made minimal attempts to initiate services from IRC, with the exception of wanting monetary assistance.

At the 18-month permanency review hearing on April 15, 2008, the juvenile court found by preponderance of the evidence that returning the child to parents "would create a substantial risk of detriment to the safety, protection, or physical, or emotional well-being of the child." Counsel for both parents argued that the parents had not received reasonable services because of the delay of time in which the referral for psychological evaluations had been made and the lack of assistance in accessing IRC services, among other reasons. While the court stated that it was "clear . . . that services could have been

better," it nevertheless found that the parents had received reasonable services and the extent of parents' progress was unsatisfactory. Reunification services were terminated, and a section 366.26 hearing was set.

The section 366.26 hearing was held on October 6, 2008. Prior to the hearing, both parents filed section 388 petitions requesting that the court grant them an additional six months of services. Father argued that it was in the child's best interests and his circumstances had changed, namely, he had steady employment and was accessing IRC services. Mother noted her visitation, a strong parent/child bond, and the fact that she was working with IRC to assist her with employment, transportation, and daily choices.

At the section 366.26 hearing, the juvenile court heard the section 388 petitions. Mother's counsel argued that the parents had obtained a home, while Father's counsel argued that Father was employed. The child's counsel argued that "a home in itself and a job in itself are not sufficient in this particular case. The child does have some medical issues and needs more care than an ordinary child." He further argued there was "nothing presented to the Court in [the petition] that suggests there is a change in that regard." The court stated, "In contemplating whether there is a change of circumstances, there does appear to be some change that has taken place in the last couple of months in the parents' lives. First of all, the father has, apparently, obtained work, which has been an issue through the entire history of this case. And I do note that the child was removed from the care of the parents in April of 2006; that, basically, almost two years of services were given to the parents before this Court terminated reunification services in April of 2008." The court further stated, "The Court notes the mother's involvement with [IRC]. All of

this has taken place just recently. There does appear to be some change. Whether that change rises to the level of being a significant change that would characterize it [as] a change of circumstance that warrants the Court changing its previous order I think is questionable." The court then stated that "even if the Court did find that it was a significant change of circumstance to meet the threshold of the first prong, I do not find it would be in the best interest of [the child] to do that." The court indicated that it did not "see any evidence that it would benefit [the child] at all to reunify with the parents at this time based on the limitations that they have, based upon their failure to truly take advantage and show improvement over the course of two years of reunification services." The court denied the motions.

Proceeding to the section 366.26 hearing, the Department recommended termination of parental rights with adoption as the permanent plan. The child is a medically fragile child due to his heart condition. Although surgery has repaired his heart, he was diagnosed with a sensory integration problem consisting of episodes of inability to control impulses which make him rock incessantly. He is developmentally delayed, a client of IRC, and in the Early Start Program. He receives occupational and physical therapy for speech development. In April 2008, he was 31 months old; however, he functioned at a 20- to 23-month-old level in fine motor skills, 16- to 19-month-old level in cognitive skills, and 9- to 11-month-old level in language. He was learning sign language to communicate. The child was placed in a new medically fragile home on January 15, 2008. The foster parents were in their early 50's. While they have some health issues, they desire to adopt the child.

Both parents' counsel argued that the child was not a generally adoptable child due to his health problems and his delayed development. Rejecting the argument of parents' counsel, the juvenile court found by clear and convincing evidence that it is likely the child will be adopted, and that no exception to adoption existed. The juvenile court terminated parental rights and selected a permanent plan of adoption.

## II. SECTION 388 PETITIONS

Both parents contend that the juvenile court abused its discretion in denying their section 388 petitions. We find no abuse of discretion.

Under section 388, "[t]he petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, *and* the proposed modification is in the child's best interest. [Citations.]" (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.) "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Some factors the court may consider in determining the best interests of the child include: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

On appeal, we will not disturb the juvenile court's ruling on a section 388 petition absent a showing of a clear abuse of discretion. (*In re Jasmon O*. (1994) 8 Cal.4th 398, 415-416.)

*A. The Court Properly Denied Mother's Petition*

On appeal, Mother argues that in denying her petition, the court erred in finding her circumstances had not changed. It is true, as Mother asserts and the trial court found, that she did show some changed circumstances from the time her reunification services were terminated. In the petition, she alleged that she has a stable residence, was working with IRC, and was accessing its services to assist her with employment, transportation, and daily choices. She further alleged that if the child were returned to her, IRC would assist her with his care. Given IRC's involvement, Mother contends she demonstrated changed circumstances. However, while these changes were admirable, Mother's case plan required her to complete all of the medically enhanced requirements, which she had not done. More importantly, while Mother alleged that she was working with IRC, such action amounted to no more than *changing* circumstances, not *changed* circumstances.

Furthermore, as to the child's best interests, Mother's petition alleged merely that she visited the child regularly and there is a strong parent/child bond that should be maintained. Mother's petition clearly failed to demonstrate how reinstating reunification services would be in the child's best interests. Nonetheless, on appeal, she contends that in light of the factors delineated in *In re Kimberly F.*, *supra*, 56 Cal.App.4th 519, it was in the child's best interests to reinstate reunification services. Mother discusses three factors: (1) seriousness of the problem which led to the dependency; (2) strength of the

parent/child bond; and (3) the degree to which the problem has been removed. As to the seriousness of the problems that led to the dependency and the degree to which they have been removed, Mother asserts that "it does not fall into the extreme category of sexual abuse and physical abuse cases," and that it has been removed. However, contrary to her claim, there was no clear evidence that the problem had been removed. While parents had moved into the paternal great-grandmother's mobilehome, she required the parents to pay rent. While Father was employed, Mother was not. More importantly, the child came to the attention of the Department because he was a medically fragile child who was failing to survive due to the parents' inability to comprehend and meet his needs. There is no evidence, nor does Mother argue, that the parents' inability to comprehend and meet the child's needs has changed.

In addition, Mother contends the child shares a strong bond with her because he calls her "Mommy" and laughs and plays with her. While it appears that the child enjoys his visits with Mother, there is no support that their bond is so strong that it is in his best interests to preserve it. According to the record, the child has not lived with his parents since he was seven months old. Neither parent has cared for the child on a daily basis. In contrast, by the time of the section 388 hearing, the child had lived with the prospective adoptive parents for nine months. They were trained to care for a medically fragile child, the child had adjusted well to their home, and they were developing a loving and committed relationship with him. The prospective adoptive parents were meeting all of the child's social, emotional, and physical needs. The child deserved permanency and

stability, which the prospective adoptive family was willing and able to provide. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Ultimately, we cannot say the court's decision to deny Mother's section 388 petition was arbitrary or capricious. We accordingly find no abuse of discretion.

*B. The Court Properly Denied Father's Petition*

Father challenges the juvenile court's finding that the change of circumstances was not significant and that the child's best interests were not served by additional reunification services. On appeal, he contends the "trial court abused its discretion by imposing the additional requirement that the change in circumstances be 'significant,' where none is required by the express language of section 388." We reject his contention. Turning to the record, we note the words of the court: "There does appear to be some change. Whether that change rises to the level of being a significant change that would characterize it [as] a change of circumstance that warrants the Court changing its previous order I think is questionable.". The court did not elevate the standard; it merely noted that changes had occurred but not sufficiently enough to meet the standard.

Challenging the finding of no change in circumstances, Father points out that he had completed or was working on completing the classes required under his service plan, he was accessing IRC services, he was living in more suitable housing, and he had been steadily employed for two months. Because he had "completed one of the most important requirements of reunification, by obtaining and maintaining steady employment and stable housing," he argues that he "established a significant change in circumstances." We disagree.

While Father was employed at the time of the section 388 hearing, he had been employed for only two months. He had previously found employment but lost it shortly thereafter. While being employed for two months may suggest that Father's circumstances were changing, it does not evidence changed circumstances. Regarding the housing situation, the paternal great-grandmother allowed the parents to move into the mobilehome; however, she expected them to pay rent of $1,200 per month. Also, according to the April 2008 report, the mobilehome did not have heat. As the child's counsel stated, "It's my understanding that the house they are in is still the same house they were in before where the paternal [great-]grandmother was threatening to kick them out. It didn't have heat. She was going to demand $1200 a month in rent. The point being is that I don't even know if their housing is stable." More importantly, the child has medical issues and needs beyond what an ordinary child has. As we noted with Mother, Father was unable to demonstrate changed circumstances.

Notwithstanding the above, even if we were to accept Father's contention and find that the court erred in elevating the standard of changed circumstances as required by section 388, Father was still required to establish that it was in the child's best interests to reinstate reunification services. In his petition, Father alleged that he "loves his child very much[ and he] has visited constantly with the child. (See attached visitation log & photos)." However, the strength of the bond between Father and the child is not adequately demonstrated in the record. According to the April 2008 report, the parents mainly talked between themselves during visitation. As noted above, the child has not lived with his parents since he was seven months old. Neither parent has cared for the

child on a daily basis. Father failed to establish how he would provide permanence for the child. Throughout the dependency, he was not able to establish a stable and secure home environment suitable for children, especially a child with significant special needs.

In contrast, by the time of the section 388 hearing, the child had lived with the prospective adoptive parents for nine months. They were trained to care for a medically fragile child, the child had adjusted well to their home, and they were developing a loving and committed relationship with him. The prospective adoptive parents were meeting all of the child's social, emotional, and physical needs. The child deserved permanency and stability, which the prospective adoptive family was willing and able to provide. (*In re Stephanie M.*, *supra*, 7 Cal. 4th at p. 317.)

We conclude the court did not abuse its discretion in denying Father's petition.

III. BENEFICIAL PARENT RELATIONSHIP EXCEPTION TO ADOPTION

Both parents contend the exception to parental rights termination set out in section 366.26, subdivision (c)(1)(B)(i) applies in this case, and therefore, the juvenile court erred when it terminated their parental rights to D.M.

Once reunification services have been terminated and the child has been found adoptable, "adoption should be ordered unless exceptional circumstances exist . . . ." (*In re Casey D*. (1999) 70 Cal.App.4th 38, 51 .) Pursuant to section 366.26, subdivision (c)(1)(B)(i), the court may find a compelling reason for determining that termination would be detrimental to the child if the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. The parents have the burden of proving that termination would be detrimental to the child

under one of the enumerated exceptions. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; *In re Jerome D*. (2000) 84 Cal.App.4th 1200, 1207.) "[I]t is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D., supra,* at p. 1350.) "A finding no exceptional circumstance exists is customarily challenged on the sufficiency of the evidence." (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 575; see also *In re Jerome D., supra*, at p. 1207.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H., supra,* at p. 576.)

The "beneficial parental relationship" exception applies where "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection

and stimulation. [Citation.]" (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id.* at pp. 575- 576.)

Regarding the first prong of the statute, i.e., maintaining regular visitation and contact, both parents claim they consistently visited the child and that he enjoyed the visits. In fact, at one point, the parents were allowed unsupervised visitation. Accordingly, Father claims these weekly visits, which continued for approximately seven months, "undoubtedly provid[ed] [him] with an opportunity to parent and take care of [the child.]" Turning to the record, we note that for the most part, the parents did visit the child regularly. However, the visits never rose to the level of establishing the emotional bond that exists between a parent and child. While the child was happy to go spend the day with the parents, he would return dirty, hungry, and in need of a diaper change. During supervised visits, the parents generally watched a movie while the child played independently. On March 31, 2008, the social worker noted that during the visit, "'there is little interaction between the parents and the child. The natural mother will sit in the same seat at every visit and does not ever get up to play or interact with the child. The natural mother will hold [the child] for a few minutes during the visits until he wiggles out to play with the toys. The natural mother will not engage in play or attempt to

communicate with the child . . . ." As to the Father, the social worker noted that he typically "remains seated in his chair while the visits occur."

Regarding the second prong, i.e., the child would benefit from continuing the relationship, there is insufficient evidence that the child would benefit more from continuing his parent-child relationship with the parents than from adoption. At the time of the section 366.26 hearing, the child had lived with his prospective adoptive family for nine months, two months longer than he had lived with his parents. There was a strong bond between the child and the prospective adoptive parents. The child was happy, the prospective adoptive parents were trained to take care of a medically fragile child, and they were motivated to adopt him because they believed they could provide him with love and a nurturing home environment.

For the above reasons, we conclude the juvenile court reasonably found there was insufficient evidence that the child would benefit more from continuing his relationship with the parents than from adoption. The child was doing well in his prospective adoptive family's home. There is no evidence that he would be harmed—much less "greatly harmed" (see *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953)—by severing his relationship, if any, with the parents. The juvenile court thus properly found that the beneficial parental relationship exception to terminating parental rights did not apply.

## IV. ADOPTABILITY

Both parents contend the evidence does not support the juvenile court's finding that the child is adoptable. Specifically, they contend that because the child is a

medically fragile child with sensory integration problems and developmental delays, he is not generally adoptable. We do not share the parents' view of the record.

As a prerequisite to termination of parental rights under section 366. 26, a court must find by clear and convincing evidence that the child is likely to be adopted. (§ 366.26, subd. (c)(1); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250.) "On appeal, we review the factual basis for the trial court's finding of adoptability and termination of parental rights for substantial evidence. [Citation.] We therefore 'presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.' [Citation.]" (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.)

"The issue of adoptability posed in a section 366.26 hearing focuses on the *minor*, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649; see also *In re Zeth S.* (2003) 31 Cal.4th 396, 406.) "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*. [Citation.]" (*In re Sarah M., supra,* at pp. 1649-1650.)

The evidence presented in the trial court includes not only the social worker's opinion that the child is adoptable, but also the fact that in January 2008, the Department placed the child with prospective adoptive parents. According to the social worker, the child is a very happy three-year-old who smiles at everyone. He is in good health, walks on his own, and is running. Although he is developmentally behind, he appears to be a mentally and emotionally stable child. Regarding the prospective adoptive parents, Mother asserts they have "medical conditions of concern." However, as the child's counsel noted at the hearing, and the Department points out, the prospective adoptive mother was prescribed a number of medications, and she stated that the maladies are under control. The prospective adoptive father was also taking prescribed medications for his conditions. Moreover, they had previously adopted a child and were successful in raising her.

The evidence is sufficient to support the juvenile court's finding that the child is adoptable.

## V. DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.